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IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

PORTLOCK COMMUNITY ASSOCIATION, *et al.*,
v.
Appellants,

FRANK E. MIDKIFF, *et al.*,
Appellees.

On Appeal from the United States Court
of Appeals for the Ninth Circuit

MOTION TO AFFIRM

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QUESTIONS PRESENTED

Appellees respectfully submit that the only questions properly before this Court are the following: *

1. Whether a state statute providing for a taking by eminent domain of the fee simple title of lessors' lots for the immediate transfer of that title to lessees violates the "public use" requirement of the Fifth and Fourteenth Amendments to the Constitution of the United States, where that taking (a) can be performed only at the behest of the individual lessees already owning homes situate upon the lots; (b) applies only to the specific lots for which the lessees have applied and for which the lessees themselves pay the amount awarded upon condemnation; (c) does not change the use, usability, possession, or occupancy of the lots taken, or their environs, but instead simply transfers title to the applicant lessees; (d) involves the State only as the conduit for the transfer of title; and (e) does not establish any restriction of any kind upon the lessees' right to impose restraints upon the further alienation of those lots once the lessees have obtained title.

2. Whether the courts below did not correctly assume jurisdiction over the constitutional questions presented where:

(a) under the *Pullman* doctrine, (i) no party had raised this doctrine in the Court of Appeals; and (ii) the state eminent domain statute at issue clearly stated that any exercise of the state's eminent domain authority "is

* The various appellants in Nos. 83-141, 83-236 and 83-283 cannot agree as to what the Questions Presented are and have set forth three different sets of such questions. See the Jurisdictional Statement of the Hawaii Housing Authority *et al.* (hereinafter "HHA JS") at i; the Jurisdictional Statement of the Kahala Community Association *et al.* (hereinafter "Kahala JS"), at 1; and the Jurisdictional Statement of the Portlock Community Association *et al.* (hereinafter "Portlock JS") at i.

for a public use and purpose," thus leaving no room for ambiguity or a different state court interpretation;

(b) under the *Younger* doctrine, (i) the State never claimed at any time throughout the proceedings in both lower courts that *Younger* was applicable and, to the contrary, affirmatively sought a federal judicial decision on the merits; (ii) private parties cannot assert *Younger* abstention; and (iii) there were no pending state court proceedings either at the time this suit was brought or at the time the federal District Court issued a temporary restraining order and later a partial preliminary injunction against the enforcement of the challenged state law;

(c) under the *Burford* doctrine, (i) no party had ever contended before now that abstention was appropriate under this doctrine; (ii) appellees raised substantial federal constitutional claims under 42 U.S.C. § 1983 in their complaint; (iii) there was no question of whether the State had the purported authority, under state law, to condemn appellees' property; and (iv) the State had not established a specialized court system to resolve state condemnation suits; and

(d) under the *Colorado River* doctrine, (i) no party had ever contended before now that abstention was appropriate under this doctrine; (ii) there was no federal statute counseling in favor of state court litigation; (iii) plaintiffs' claims were based upon federal law; (iv) the federal suit preceded the filing of any state court suit; (v) abstention would have inevitably have lead to piece-meal litigation; and (vi) there was no inconvenience to the parties in litigating this case in federal court.**

** If probable jurisdiction is noted, appellees will also address the following questions which were presented to, but did not have to be decided by, the Court of Appeals:

3. Whether the state statute described in Question 1 violates the Due Process Clause of the Fourteenth Amendment by imper-

missibly delegating to private parties the right to exercise the sovereign power of eminent domain.

4. Whether the state statute described in Question 1 violates the Due Process Clause of the Fourteenth Amendment by failing to have as a sustaining legislative purpose anything other than a bare desire to harm a politically unpopular group of landowners within the state.

5. Whether the state statute described in Question 1 violates the Contract Clause of Article I, § 10, of the Constitution as applied to leases executed prior to its initial enactment.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

No. 83-236

PORLOCK COMMUNITY ASSOCIATION, *et al.*,
v. *Appellants*,

FRANK E. MIDKIFF, *et al.*,
Appellees.

On Appeal from the United States Court
of Appeals for the Ninth Circuit

MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellees Frank E. Midkiff, *et al.* (hereinafter "Trustees"), move that the judgment of the United States Court of Appeals for the Ninth Circuit be affirmed on the ground that the judgment is plainly correct and the challenge to it so insubstantial as to warrant no further review.

STATEMENT

Trustees recite here only those facts relevant to the Court's consideration of appellants' arguments on abstention. For a fuller discussion of the underlying facts, we invite the Court's attention to the Statement in our Motions to Affirm in Nos. 83-141 and 83-283, which is incorporated herein by reference.

A. Background.

The initial version of Chapter 516 was enacted as Act 307 in 1967.¹ For nearly a decade the statute lay dor-

¹ 1967 Haw. Sess. Laws, Act 307 (hereinafter "Act 307").

mant,² in part due to unanswered questions regarding its constitutionality,³ and in part due to the continuance of low rents fixed at the inception of the lease terms.⁴ After a series of liberalizing amendments to improve the lessees' litigation position, the HHA began administrative proceedings in 1978 that, if uninterrupted, would ultimately have led to the involuntary condemnation of Trustees' fee title in various lots. These included a direction that Trustees submit to mandatory arbitration for *prima facie* determination of the prices to be paid to Trustees by lessees in Tract H of the Waialae-Kahala subdivision in

² Prior to these proceedings, all actions under the purported authority of the statute were carried out by voluntary agreement among the lessors and the lessees (Preliminary Injunction Hearing, April 24-27, 1979 (Tr. 217)).

³ Act 307 gave the Hawaii Supreme Court original jurisdiction of suits questioning the statute's constitutionality. Trustees filed two such actions in 1967 (*Midkiff v. Hasegawa*, No. 4727, and *Midkiff v. McCormack*, No. 4728) and another residential lessor filed a similar action (*Davis v. Finance Realty*, No. 4735). The HHA and the State of Hawaii were defendants in the three suits. When the legislature rendered moot many of the questions raised, through statutory amendments designed to blunt the Complaints (1968 Haw. Sess. Laws, Act 46), the suits were dismissed without prejudice. Recognizing that the legislature could legislate faster than they could litigate, Trustees declined to seek judicial protection again until the statute was applied against them. Meantime, in 1975, the Hawaii Attorney General brought suit against the Hawaii Budget Director challenging the constitutionality of the statute on grounds, among others, that it provided for taking private property for non-public purposes. This, too, was dismissed without prejudice. *State v. Anderson*, Civil No. 43937 (Haw. Cir. Ct.).

⁴ In most residential leases, rent is fixed for a period of 25 to 40 years, with rent for the remaining term to be renegotiated or arbitrated at the end of the fixed rent period. Rents fixed in many household tracts developed shortly after World War II became less than nominal as land values increased. Thus, until these rents began to come up for renegotiation in the 1970's, there was no economic incentive for a lessee to abandon the rent bargain by purchasing the fee title.

Honolulu for the taking of the fee simple title.⁵ Under state law, none of these administrative proceedings was part of any later-filed state court condemnation suit; Haw. Rev. Stat. § 516-51(b) explicitly states that “[t]his mandatory arbitration shall be in advance of and shall not constitute any part of any action in condemnation or eminent domain.”⁶ Rather than submit to mandatory arbitration, Trustees instead brought the present action for injunctive and declaratory relief.

B. The Proceedings Below.

1. Before any state court condemnation suits were filed against them, Trustees filed this suit on February 28, 1979, seeking a declaratory judgment that Chapter 516 is unconstitutional and an injunction against its enforcement.⁷ In its answer, HHA raised only the rationale

⁵ Decision on Motion for Preliminary Injunction (HHA JS App. A102 n.52). Trustees and the lessees in Tract H ultimately agreed upon a voluntary sale, and the Tract H Community Association withdrew its intervention in this lawsuit.

⁶ After the District Court had ruled that the mandatory arbitration provisions were unconstitutional, the legislature amended this section to substitute the term “preliminary negotiations” for the term “mandatory arbitration” (1980 Haw. Sess. Laws, Act 107, § 3; HHA JS A131-A132).

⁷ Trustees’ complaint asserted that the use of eminent domain for the taking of fee simple titles for transfer to lessees was solely for private use and not for public use, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. The complaint also alleged that the statute does not vest power in the state or its agency, the HHA, to make the essential determination as to which, if any, lots should be taken; but, rather, unconstitutionally delegates that power to lessees. Further, it alleged that the statute contravenes the Contract Clause of the Constitution because it abrogates the terms of pre-existing lease contracts (Record Excerpts in the Court of Appeals (“RE”), 10-14).

Finally, the complaint asserted the unconstitutionality of the compensation and the compulsory arbitration provisions of the statute. These, as noted below, were held unconstitutional by the District Court and are not in issue before this Court.

of *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941), as a basis for abstention, and did not assert that any other abstention doctrine was appropriate.⁸ Several private organizations, representing lessees of appellees' property, later intervened.⁹ Like HHA, the only abstention doctrine adverted to in the answers (filed on behalf of some, not all, of the intervenors) was *Pullman* abstention (RE 67). Furthermore, intervenors admitted in their answers what Chapter 516 itself makes clear: that the administrative proceedings antedating the filing of appellees' suit in federal court were "not part of any action in condemnation or eminent domain" (RE 60).

2. At the time Trustees filed their suit, there were no pending state court proceedings involving the constitutionality of Chapter 516. The Ninth Circuit's express finding to this effect (HHA JS App. A2-A4 n.1) is plainly correct. The case cited by Portlock (Portlock JS 6-7) involved a challenge to a different statute, Haw. Rev. Stat. § 519-2, Hawaii's rent control law, which is *not* a part of the so-called Land Reform Act.¹⁰ Trustees could not

⁸ Paragraph 18 of HHA's answer stated:

This court should abstain from ruling on the matters raised in the Complaint until such time as State courts have provided authoritative interpretations of provisions of Chapter 516, Hawaii Revised Statutes, which interpretations may preclude the necessity for a decision of the constitutional issues raised by the Complaint. [RE 52.]

HHA later made clear, in its opposition to appellees' motion for a preliminary injunction, that the *only* abstention doctrine about which it was concerned, and which it presented to the District Court, was *Pullman* (*see* State Defendants' Memorandum In Opposition To Plaintiff's [sic] Motion For Preliminary Injunction (filed Apr. 19, 1979), pp. 82-87).

⁹ On March 23, 1979, the District Court granted motions of certain community associations, representing lessees, to intervene. Some of these associations later withdrew from the case after their members purchased the fee titles to their lots in negotiated transactions.

¹⁰ Judge Lum's "extensive findings of facts" have no collateral estoppel or other legal effect. While on appeal, the case was

have earlier raised their constitutional claims in either of the two cases cited by HHA (HHA JS 6-8), because the Wai-Kahala Tract "H" suit was not filed until September 21, 1979, months after the preliminary injunction was entered by the District Court, and the Kamiloiki Valley suit was not filed until November 10, 1980, after more than another year had passed.¹¹

3. The District Court, on February 28, 1979, issued a temporary restraining order against HHA enforcement of the Act (HHA JS App. A78 & n.5), which it modified on March 27, 1979, so as to permit all procedural steps under the statute prior to mandatory arbitration and condemnation (*id.*). Trustees later moved for a preliminary injunction against the further enforcement of Chapter 516. Again, in their oppositions to Trustees' motion, the only abstention doctrine adverted to by HHA and intervenors was *Pullman* (*see note 8, supra*). After a hearing, the District Court handed down its decision on Trustees' motion on May 8, 1979 (HHA JS App. A77 *et seq.*). The preliminary injunction itself was entered on June 8, 1979.¹² There were still no state court condemna-

rendered moot and the judgment was vacated. Judgment on Appeal filed on May 18, 1982, in *Midkiff v. Amemiya*, No. 7294 (Haw. Sup. Ct.).

¹¹ Contrary to the assertions (HHA JS 6) that Wai-Kahala Tract "H" "had been designated for acquisition by HHA on October 20, 1978" and that this "designation" had been "appealed," the HHA merely passed the resolution preliminarily, concluding that designation would effect the purposes of the Act and requesting the lessor and lessees to negotiate the price to be paid. The actual designation did not occur until September 21, 1979, immediately preceding the filing of the suit. The "appeal" was an attempt by the Wai-Kahala Tract "H" lessees to force Trustees into an arbitration in District Court which was later held unconstitutional.

¹² The preliminary injunction permitted condemnation of the fee simple title to leasehold lots, but restrained compulsory arbitration and exclusive use of the valuation formulae provided by the statute.

tion proceedings involving Trustees filed even by this time.¹³

Thereafter, HHA and intervenors abandoned even the very limited abstention argument they had made previously. Without claiming that abstention was appropriate for *any* reason, and prior to the filing of any state court proceedings involving Trustees, they filed motions for partial summary judgment asking the District Court to uphold the constitutionality of the statute on the basis of the legislative findings. Without affording Trustees an opportunity to present any evidence to the contrary, the District Court filed its decision upholding the constitutionality of the statute.¹⁴ Trustees appealed.

4. No appellant initially argued to the Court of Appeals that abstention was required under any theory; the Ninth Circuit panel raised this issue on its own during oral argument (HHA JS App. A30 & n.7 (Poole, J.)). After requesting and receiving post-argument briefing on this issue—in which both HHA and Kahala argued that abstention was *unwarranted* for *any* reason and asked the Court of Appeals to reach the merits of Trustees' claims—a majority of the Court of Appeals concluded that abstention would have been improper (HHA JS App. A2-A4 n.1; *id.* at A22-A31 (Poole, J.)).¹⁵ On the merits, the

¹³ The earliest condemnation suits against Trustees were filed in September 1979 (HHA JS App. A30 (Poole, J.)).

¹⁴ The District Court's decision was embodied in its Amended Memorandum Decision on December 19, 1979 (HHA JS App. A64 *et seq.*) Finally, the District Court granted the HHA and intervenors' motion for partial summary judgment, ruling against Trustees on the remainder of their constitutional claims. Final Judgment and Permanent Injunction, incorporating all rulings of the District Court, was entered on June 10, 1980.

¹⁵ First, the Court ruled that abstention was unnecessary under *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941), because in light of the clear statement of legislative intent in Haw. Rev. Stat. § 516-83(a)(12), there was no uncertain issue of state law, only

court ruled that Chapter 516 violated the Public Use Clause because the Act did not forward any purpose other than to transfer land from one party to another, and this purpose was barred by the Public Use Clause.¹⁶

C. The Events Following the Court of Appeals' Decision.

Following the entry of the court's decision on March 28, 1983, Trustees sought to stay any further state court proceedings. At that time, Trustees were faced with the prospect of entry of judgment, and the consequent, potentially-irreversible transfer of their property in an ongoing state court suit begun after Trustees had obtained preliminary injunctive relief from the District Court. *Hawaii Housing Authority v. Midkiff*, Civil No.

the question of whether Chapter 516 was constitutional (HHA JS App. A2-A4 n.1; *id.* at A23-A24 (Poole, J.)).

Second, *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), did not require abstention because Hawaii had not funnelled all condemnation suits (and challenges thereto) into a single specialized court, and there was no question, inseparable from the federal claims, of whether the state had authority to effect these condemnations (HHA JS App. A2-A4 n.1; *id.* at A24-A25 (Poole, J.)).

Third, *Younger v. Harris*, 401 U.S. 37 (1971), did not require abstention because there were no state court proceedings pending at the time the District Court had entered a temporary restraining order (February 28) and, later, a partial preliminary injunction (June 8), since HHA did not file its first eminent domain suit against Trustees in state court until September 1979 (HHA JS App. A2-A4 n.1). Judge Poole also concuded that the State had waived any claim that *Younger* was applicable by failing to invoke that doctrine in the District Court or Court of Appeals (HHA JS App. A26-A31).

Finally, Judge Poole concluded that *Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800 (1976), was inapplicable because of the absence of any exceptional circumstances, such as the McCarran Amendment, favoring state court litigation (HHA JS App. A25-A26).

¹⁶ Because of the Court's ruling, it did not consider Trustees' other arguments.

63408 (Haw. Cir. Ct.). Trustees first sought relief in the state courts, from both the Circuit Court in the above case, and from the Hawaii Supreme Court, but all efforts proved futile.¹⁷ Trustees also sought an injunction from the Court of Appeals staying the ongoing state court trial pending issuance of the mandate. On April 14, the Court of Appeals declined to enjoin the above state court condemnation suit *pending issuance of the mandate* because the court was unwilling to "presum[e] that the Courts of Hawaii under the Supremacy Clause of the United States Constitution, and in light of this Court's decision of March 28, 1983, will fail to discharge their obligation with respect to the rights of appellants." *Midkiff v. Tom*, No. 80-4368 (Apr. 14, 1983), slip op. at 2. Later events demonstrated beyond any doubt, however, that this presumption was unjustified.

The Court of Appeals' mandate issued on June 27, 1983, and the District Court set a hearing for July 8, 1983, on Trustees' motion for entry of final judgment, which the District Court later continued, on HHA's motion, until July 15, 1983. On that day, just prior to the hearing, HHA filed two more condemnation suits involving an additional 727 of Trustees' residential subdivisions. By this time, more than 4,000 of Trustees' lots were at risk. At the July 15 hearing, Trustees introduced uncontested evidence that HHA intended to proceed with further condemnation suits against their property as if the Court of Appeals had never issued its March 28 decision. Moreover, counsel for HHA and

¹⁷ See *Hawaii Housing Authority v. Midkiff*, Civil No. 63408 (Haw. Cir. Ct. Mar. 30, 1983) (oral bench ruling denying Trustees' motion for a stay); *Midkiff v. Grieg*, No. 9208 (Haw. Sup. Ct. Apr. 21, 1983) (mem.) (order denying Trustees' Amended Petition for a Writ of Prohibition or for Writ of Mandamus and Amended Ex Parte Motion for Temporary Stay); *Hawaii Housing Authority v. Midkiff*, Civil No. 63408 (Haw. Cir. Ct. Apr. 28, 1983) (order denying Trustees' Motion to Dismiss or, in the alternative, to Reconsider Trustees' Motion to Stay Proceedings).

intervenors conceded that this was their very intent. Notwithstanding Trustees' proof, and HHA's admission, that appellants fully intended to disregard the Court of Appeals' March 28 decision, the District Court denied Trustees' motion for a permanent injunction (Transcript of July 15, 1983, Hearing Before the District Court, at 82-83).¹⁸

Four days later, on July 19, Trustees filed a motion with the Court of Appeals seeking recall and clarification of its June 27 mandate. After receiving further briefing from the parties, the Court of Appeals, on August 11, 1983, issued an order recalling its mandate. *Midkiff v. Tom*, No. 80-4368, slip op. at 1-2. Observing that "[t]he district court has indicated uncertainty as to our intention set forth in the opinion" (*id.* at 1), which was the reason its judgment had not been "implemented" (*id.*), the Court of Appeals recalled its mandate and set an expedited briefing schedule for the parties to address the appropriate form of the decree to be issued (*id.*). Pending issuance of that revised mandate, the court enjoined HHA, intervenors, and related parties from pursuing any ongoing or future condemnation suits under Chapter 516 (*id.* at 2).

Without awaiting the issuance of that revised mandate, appellants sought a stay of the Court of Appeals' August 11 Order from Justice Rehnquist, acting as Circuit Justice for the Ninth Circuit. On September 2, he denied appellants' application. *Hawaii Housing Authority v. Midkiff*, No. A-113 (in Chambers). The Court of Appeals thereafter reset an expedited briefing schedule on

¹⁸ The District Court gave two reasons for that ruling. First, it relied upon HHA's representation that it would not permit title to pass in *Hawaii Housing Authority v. Midkiff*, Civil No. 63408 (Haw. Cir. Ct.). Second, the court relied upon the Court of Appeals' decision, handed down on April 14 before the mandate had issued, declining to award Trustees an injunction pending its issuance because of the Court of Appeals' assumption that the Hawaii state courts would respect its judgment (*see page 8, supra*).

Trustees' motion to recall and clarify the mandate. No decision has yet been rendered.

SUMMARY OF ARGUMENT¹⁹

1. HHA's and Portlock's claims that the courts below should have abstained are untimely, and therefore should not be considered by this Court. HHA had never claimed until now that *Younger*, *Burford*, or *Colorado River* were at all applicable to this case. To the contrary, HHA explicitly disavowed any reliance upon these doctrines before the Court of Appeals, and asked that court to reach the merits of Trustees' claims. HHA did invoke *Pullman* in its answer to Trustees' complaint, but abandoned that claim thereafter, declining to reassert it before the Court of Appeals. In fact, HHA also argued, as it did with respect to the other abstention doctrines, that *Pullman* abstention was unjustified. Therefore, HHA should not now be permitted to champion claims that it expressly disavowed below.

Portlock has also sought to assert abstention claims for the first time in this Court. Portlock did not claim in its answer or in its initial brief to the Court of Appeals that abstention was appropriate for any reason. Thereafter, Portlock only claimed that *Younger* was applicable in a post-argument brief after the Court of Appeals requested briefs on abstention.

2. The Ninth Circuit's narrow holding that abstention was inappropriate is manifestly correct and does not warrant further review by this Court. That decision does not conflict with any decision of this Court or any other federal court. The court applied well-established precedent in two comprehensive opinions giving detailed consideration to all the arguments made below and repeated here by appellants. Thereafter, the full Court of

¹⁹ Only HHA and Portlock have argued that abstention was appropriate in this case (HHA JS i, 23-27; Portlock JS i, 20-24). Kahala has not presented any abstention question, or supporting argument, in its jurisdictional statement.

Appeals denied *en banc* review. The court's application of the law to the unique facts of this case does not warrant further review.

(a) *Pullman* abstention is inappropriate because Chapter 516 clearly identifies takings accomplished thereunder as serving a public use, and therefore no ambiguity or opportunity for a different interpretation is present. *Younger* does not require abstention for several reasons. Not only did HHA never claim that *Younger* was applicable (and, instead, sought a federal judicial decision on the merits), but the intervenor-lessees do not have standing to assert this claim. In any event, there were no pending state court proceedings at the time appellees filed this suit, or even at the time the District Court issued a temporary restraining order and, later still, a partial preliminary injunction. By these later points in time, the District Court had clearly undertaken proceedings of substance on the merits of Trustees' federal claims, and abstention under *Younger* would have been error. In fact, allowing appellants not only to acquiesce in federal court jurisdiction but to actively seek a decision on the merits, and then permitting them to claim that the federal courts should not have been involved from the beginning, would create utter chaos in the relations between federal and state courts.

(b) The Court of Appeals' conclusions that neither *Burford* nor *Colorado River* required abstention not only are plainly correct, but also went unchallenged by the dissent below. None of the preconditions for application of these doctrines is present here, where Trustees asserted substantial federal constitutional claims (under 42 U.S.C. § 1983 (1976 & Supp. V 1981)), rather than rely solely upon diversity jurisdiction; Trustees have never challenged HHA's statutory authority to condemn their land; there is no specialized court system for resolution of Chapter 516 questions; and there is no federal statute exhibiting a special solicitude for state court eminent domain decisions.

ARGUMENT

So as not to unduly burden the Court, Trustees will not repeat here the Argument already made in their Motions to Affirm in Nos. 83-141 and 83-283 in regard to correctness of the ruling below on the constitutionality of Chapter 516. The Argument is instead incorporated herein by reference. Trustees will address in this Motion only appellants' arguments relating to abstention.

THE COURT OF APPEALS' NARROW DECISION IS MANIFESTLY CORRECT AND DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT OR OTHER CIRCUIT COURTS ON ABSTENTION.

In this case, the Court of Appeals was plainly correct in concluding that abstention would have been improper (HHA JS A2-A4 n.1; *id.* A22-A31 (Poole, J.)). No one has seriously questioned the Court of Appeals' judgment that *Pullman* and *Colorado River* are inapposite, and appellants' arguments that *Burford* or *Younger* abstention is required must also fail.

A. Pullman.

It is well-settled that *Pullman* abstention is appropriate only where a state court resolution of an uncertain question of state law may moot or substantially alter the posture of a federal constitutional question.²⁰ There is no uncertain state-law question here. As the Court of Appeals observed, Haw. Rev. Stat. § 516-83(a)(12) is "perfectly clear" and "unambiguously states" that "'[t]he use of the power to eminent domain [under Chapter 516] is for a public use and purpose' * * *'" (HHA JS App. A2-A4 n.1 (quoting § 516-83(a)(12))).

²⁰ *E.g.*, *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 306 (1979); *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 100 n.3 (1978); *Wisconsin v. Constantineau*, 400 U.S. 433, 438-439 (1971); *Zwickler v. Koota*, 389 U.S. 241, 249-251 (1967).

No appellant has ever cited any provision of Chapter 516 suggesting that Section 516-83(a)(12) (or (10)) does not mean exactly what it says, or any provision of that *existing* Act—rather than ones Hawaii has never enacted—in any way negating or lessening the plain language of Section 516-83(a)(12) (or (10)).²¹ Accordingly, the Court of Appeals' conclusion that "there is no fair construction of this provision that would moot the federal issue of whether the condemnation is for a public use" (*id.*; *see id.* A23-A24 & n.2 (Poole, J.)) is inescapable.²²

Instead, HHA alone argues (HHA JS 24-25) that the possibility of a state court decision invalidating Chapter 516 on state constitutional grounds requires abstention. But this Court has twice rejected the argument that *Pullman* requires abstention, notwithstanding an unambiguous state law, simply because of the hypothetical possibility that state courts might invalidate a state statute under the state, rather than the federal Constitution. *Examining Board v. Flores de Otero*, 426 U.S. 572, 598 (1976); *Wisconsin v. Constantineau*, 400 U.S. at 437-439. Under the contrary rule, *Pullman* abstention would be appropriate in every case because, as HHA admits (HHA JS 24 & n.61), state courts can always invalidate state laws on state constitutional grounds, thereby "convert[ing] abstention from an exception into a general

²¹ To the same effect is Haw. Rev. Stat. § 516-83(a)(10) ("The State's acquisition of residential lands held in fee simple, through the exercise of the power of eminent domain, for the purposes of this chapter is for the public use and purpose of protecting the public safety, health and welfare of all people in Hawaii"; HHA JS App. A139). *See also* §§ 516-83(a)(11), (18); § 516-83(b); HHA JS App. A139-140.

²² In fact, any such contention would be plainly inconsistent with HHA's insistence that "[t]he legislature concluded * * * that the Act would realize public purposes and put land to public use" (HHA JS 4; footnote omitted).

rule." *Examining Board*, 426 U.S. at 598 (footnote omitted).

Finally, the fact that an Hawaii state court is not likely either to interpret Chapter 516 in some unique way or render it unconstitutional under the state Constitution is borne out by the only state court decision extant on the subject. This decision, of course, was rendered by Judge Greig of the Hawaii Circuit Court in *Hawaii Housing Authority v. Midkiff*, Civil No. 63408, well after the trial and appellate proceedings on the merits had been concluded in the federal courts.²³ But while Judge Greig disagreed with the Court of Appeals respecting the constitutionality of Chapter 516,²⁴ he did not interpret the statute differently, nor did he find it in conflict with the Hawaii Constitution. Thus, any argument as to what the state courts might do with Chapter 516 that would render the federal courts' decision moot becomes so speculative as to lose meaning.²⁵

²³ Findings of Fact and Conclusions of Law entered September 6, 1983.

²⁴ Judge Greig entirely ignored the Court of Appeals' opinion. His findings of fact and conclusions of law contain no reference whatsoever to the Ninth Circuit's judgment declaring the condemnation provision of Chapter 516 facially unconstitutional, nor any reference to Trustees' defense that that judgment was *res judicata* upon the federal constitutional issues.

²⁵ Moreover, none of the reasons given by the dissent in the Court of Appeals for *Pullman* abstention can pass muster.

First. The argument that the federal constitutional question need not be reached if the State can regulate the lessees' post-acquisition use of their new leaseholds hypothesizes state-court interpretations of a statute Hawaii has *never* enacted, and simply fails to address the particular statute at issue here. No provision of the *existing* Act so regulates lessees' post-acquisition use — a point which was noted by the Court of Appeals majority (*see, e.g.*, HHA JS App. A17-A18; *id.* A32-A33, A36 (Poole, J.)) and not denied by the dissent. *Pullman* does not require a federal court

B. Younger.

There is no *Younger* issue in this case.

1. First, HHA may not raise any *Younger* claim at this late date. HHA has *never* before argued that *Younger* abstention is appropriate—whether to the District Court, the panel in the Court of Appeals, or the Ninth Circuit *en banc*. Therefore, HHA may not raise this issue for the first time in this Court. *Vance v. Universal Amusement Co.*, 445 U.S. 308, 315 n.11 (1980) (*per curiam*) (specifically applying this rule to *Younger*).²⁶ Application of that rule is appropriate notwithstanding the state interests *Younger* protects. In a parallel context, the Court has refused to permit the State to protect already-entered judgments of conviction in criminal cases by invoking

to await a state court interpretation of an as-yet-unenacted state law before considering a federal constitutional claim.

Second. The “possibility of a constitutional construction of the statute” referred to by the dissent below (HHA JS App. A48) is based upon the dissent’s interpretation of the federal Constitution, *not* Chapter 516 (*id.*, referring to dissent at A53-A60). A federal court may not abstain under *Pullman*, however, simply to give a state court the first opportunity to rule on a federal constitutional question. *Zwickler v. Koota*, 389 U.S. at 250-251 & n.14, and cases cited therein.

Third. The distinction drawn by the dissent in the Court of Appeals between cases involving racial or gender discrimination and land use (HHA JS App. A48-A49) is based entirely upon an earlier *dissenting* opinion by the same author (*id.* at A49), is contrary to well-established precedent (*e.g.*, *Harrison v. NAACP*, 360 U.S. 167 (1959); 17 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4242, at 465 (1978) (“it is clear that there is no rule to this effect”)), and overlooks the fact that the Trustees too have raised a claim protected by the Fourteenth Amendment.

²⁶ *Vance* is simply an application to *Younger* of the general rule that a party-appellant may not raise in this Court an issue not raised below. *E.g.*, *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); R. Stern & E. Gressman, *Supreme Court Practice* (5th ed. 1978), p. 457, and cases cited therein.

Wainwright v. Sykes, 433 U.S. 72 (1977), for the first time in this Court. *E.g.*, *Estelle v. Smith*, 451 U.S. 454, 468 n.12 (1981); *Jenkins v. Anderson*, 447 U.S. 231, 234 n.1 (1980).²⁷ It is manifest that the state interests underlying *Sykes* are equal to, if not greater than (because of the additional interest in finality), those underlying *Younger*. Compare *Engle v. Isaac*, 456 U.S. 107, 126-128 (1982), and *Sykes*, 433 U.S. at 89-91, with *Younger*, 401 U.S. at 43-49. Therefore, requiring HHA to demonstrate its need for *Younger* by invoking that doctrine in the lower federal courts is entirely appropriate.

Equally important, permitting the state to oust a federal court of jurisdiction *after* that court has decided the merits of a party's claim adversely to the state, will necessarily entail the same costs to the judicial process as this Court spoke of in *Sykes*. In that case, this Court acknowledged that forcing a state criminal defendant to assert his federal claims at trial served a variety of institutional interests: it contributed to the accuracy and finality of judgments, prevented a party from "sandbagging" a *nisi prius* state court by withholding a potentially dispositive matter until after an adverse judgment, conserved scarce judicial resources, and promoted respect for the state court judgments entered after a trial on the merits. 433 U.S. at 88-91. Those considerations are equally applicable in this parallel context. Permitting the state to withhold a *Younger* claim until after losing on the merits of a federal court's decision will entail the same institutional costs this court found unjustified in *Sykes*. The only difference is that the federal courts will suffer the disrespect attendant upon having their judgments set at naught, a distinction that, of course, makes

²⁷ See also *Hopkins v. Jarvis*, 648 F.2d 981, 983 n.2 (5th Cir. 1981) (state's failure to contest state prisoner's alleged exhaustion of state court remedies constitutes waiver of right to contest exhaustion on appeal); *Brown v. Fogel*, 387 F.2d 692, 695 (4th Cir. 1967), cert. denied, 390 U.S. 1045 (1968) (same).

no logical difference in terms of the costs involved, and one that would belittle the role of federal courts in protecting federal rights.

There is no question that the state can waive any claim under *Younger* (see *Kolender v. Lawson*, 103 S. Ct. 1855, 1857 n.3 (1983); *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 480 (1977)), and there is no good reason to relieve HHA from its failure to raise *Younger* in a timely and proper fashion. In light of the State's oft-acknowledged concern that Chapter 516 would be challenged as violating the Public Use requirement of the Eminent Domain Clause (as, indeed, the state itself had once claimed, see note 3, *supra*), HHA was well aware of the possibility that a party whose property it sought to condemn would challenge the Act on federal constitutional grounds. In fact, HHA concedes in its jurisdictional statement that it was well aware of appellees' intent to raise that very claim before this suit was filed (HHA JS 7). Nevertheless, the only abstention doctrine HHA raised in the District Court was *Pullman* abstention; HHA never argued that *Younger* abstention, or any other abstention doctrine, was at all applicable in either its initial or supplemental briefs filed with the Ninth Circuit; and HHA did not seek rehearing or rehearing *en banc* on the ground that the panel's decision not to abstain was incorrect. Permitting HHA to raise *Younger* abstention for the first time in this Court in these circumstances would permit HHA to bushwack any private party by waiting until it loses on the merits in federal court before seeking to avoid just such a result. Because Congress never intended plaintiffs, or the federal courts, to be subjected to any such gambol, there is no reason to permit HHA to toy with Trustees or this Court in that fashion. A ruling in favor of appellants on this issue would be an open invitation to future litigants to reserve all abstention arguments until after the result has been announced in the Court of Appeals and then, if

the result is adverse, raise abstention for the first time in petitions for rehearing or in this Court.

Furthermore, here HHA not only failed to assert *Younger* but argued that *Younger* was *inapplicable* and asked the Court of Appeals to reach the merits of Appellees' federal claims.²⁸ HHA may not take a contrary position now. This Court has consistently refused to sanction such a Janus-faced approach by the government of lulling the lower federal courts into believing that a potentially dispositive threshold question was not properly before them, only to turn around and present the contrary argument for the first time to this Court. *E.g.*, *Steagald v. United States*, 451 U.S. 204, 208-211 & n.5 (1981); *United States v. Ortiz*, 422 U.S. 891, 898 (1975). For this reason as well, appellants should not be permitted to shift positions, as if dancing a quadrille, to raise any *Younger* claim now.²⁹

2. Second, none of the intervenors has standing to raise this claim. The *Younger* doctrine is built upon an historic concern for intergovernmental comity and the traditional reluctance of federal equity courts to enjoin pending state court judicial proceedings. *Younger*, 401 U.S. at 43-49; *see Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431-432 (1982). None of these parties, therefore, has any interest independent of HHA's which *Younger* protects. Accordingly, because the Court of Appeals' ruling that *Younger* is inapplicable does not affect any right of any member of this

²⁸ *See* Supplemental Brief for Defendants-Appellees in the Court of Appeals (State Parties; filed Oct. 28, 1981), pp. 2-7.

²⁹ In fact, because HHA argued to the Court of Appeals that abstention was inappropriate on *any* ground (*see, e.g.*, Supplemental Brief for Defendants-Appellees in the Court of Appeals (State Parties; filed Oct. 28, 1981), p. 2), HHA may not now contend that abstention is appropriate under *Burford*, *Pullman*, or *Colorado River* as well.

class of parties, none has standing to assert this claim. *H.L. v. Matheson*, 450 U.S. 398, 406 (1981); *Harris v. McRae*, 448 U.S. 297, 320 (1980); *Warth v. Seldin*, 422 U.S. 490, 498-499 (1975). Furthermore, private parties may not champion *Younger* claims over the state's desire to obtain a federal court decision on the merits. See *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. at 480. Because HHA plainly waived any *Younger* claim in this case, none of the intervenor-appellants may now raise any such claim.³⁰

3. Third, this case does not present the issue of whether *Younger* is applicable to state court condemnation proceedings. To begin with, not only did HHA fail to raise this issue below, but the Court of Appeals found (HHA JS App. A4-A6 n.1) that there was no ongoing state judicial proceedings at the time this suit was filed.³¹

³⁰ Moreover, none of the intervenor-appellant organizations has standing to raise a *Younger* claim on behalf of its members. The only exception potentially applicable here to the rule that a party must assert his own legal rights and interests, and not those of another, to demonstrate standing (e.g., *Valley Forge Christian College v. Americans United for Separation of Church and State Inc.*, 454 U.S. 464, 474 (1982)), would lie only if the intervenor-appellants could satisfy the three-part test in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977), for an organization to have standing to represent its members. But all of the intervenor-appellant organizations fail that test because, based upon the pleadings in this case, none can fulfill the first two parts of the *Hunt* test: namely, that (1) their individual members would have standing in their own right (for the reasons given in the text), or (2) the interests furthered by *Younger* are germane to the organization's purpose. 432 U.S. at 343.

³¹ That factual conclusion is also a complete answer to Portlock's suggestion (Portlock JS 21-23) that the decision below conflicts with *Ahrenfeld v. Stephens*, 528 F.2d 193 (7th Cir. 1975). In that case, state court condemnation proceedings were pending at the time the plaintiff filed suit in federal court. 528 F.2d at 195. HHA, by contrast, candidly acknowledges this difference between this case and *Ahrenfeld* (HHA JS 26), and has not suggested that the two decisions conflict.

That finding was plainly correct: Trustees filed this suit on February 28, 1979, and HHA did not file its first suit to condemn Trustees' property that went to judgment until November 10, 1980, over a year later. Indeed, HHA expressly acknowledged in the Court of Appeals that "no state proceeding under the disputed statute involving the Trustees and HHA was pending at the time of the filing of Trustees action * * *" (Supplemental Brief for Defendants-Appellees in the Court of Appeals (State Parties; filed Oct. 28, 1981) p. 4). *Younger* was therefore no bar to this suit. *Steffel v. Thompson*, 415 U.S. 452, 462-463 (1974).

Moreover, there were still no ongoing state *judicial* proceedings at the time the District Court granted a temporary restraining order and, later, a partial preliminary injunction (HHA JS App. A2-A4 n.1; *id.* A30 (Poole, J.)). By that point, "proceedings of substance on the merits ha[d] taken place in the federal court" (*Hicks v. Miranda*, 422 U.S. 332, 349 (1975)), and, therefore, *Younger* was no bar to this suit. *See also Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930-931 (1975). HHA, again, acknowledged this fact before the Court of Appeals: "no such state proceeding [“under the disputed statute involving the Trustees and HHA”] was commenced before proceedings of substance on the merit [sic] took place in the District Court below" (Supplemental Brief for Defendants-Appellees in the Court of Appeals, pp. 4-5). Actions thereafter filed in state court do not require *Younger* abstention. *Town of Lockport v. Citizens for Community Action*, 430 U.S. 259, 264 n.8 (1977).²²

²² HHA's suggestion (HHA JS 26) that *Younger* should be extended to state administrative proceedings is inconsistent with Chapter 516, which expressly provides that administrative proceedings antedating the filing of a state court condemnation suit "shall be in advance of and shall not constitute any part of any advance of and shall not constitute any part of any action in condemnation or eminent domain" (§ 516-51(b); HHA JS A131-A132; *see* page 3, *supra*). HHA's claim is also inconsistent with this

4. Finally, Trustees submit that, regardless of which date is determinative for *Younger* purposes, that doctrine is inapplicable to privately-initiated condemnation suits like those authorized by Chapter 516. In this regard, we agree with HHA's conclusion that "the statute involved does not appear to be the kind of statute deemed to be 'in aid of and closely related to criminal statutes' as to justify the application of the [Younger] abstention doctrine to the instant civil case" (Supplemental Brief for Defendants-Appellees, p. 5). The Court of Appeals ruled that Chapter 516 simply transferred one private party's property to another, a ruling we have argued in our Motions to be plainly correct. The question of whether Chapter 516 embodies important state interests of the type *Younger* would protect is therefore at issue on the merits

Court's decision last Term in *Patsy v. Board of Regents*, 457 U.S. 496 (1982). *Patsy* held that a party need not exhaust state administrative remedies before bringing a suit in federal court under 42 U.S.C. § 1983 (as the Trustees did in this case), and further ruled that Congress had codified this principle in the Civil Rights of Institutionalized Persons Act ("CRIP"), 42 U.S.C. § 1997 *et seq.* (Supp. V 1981). The only exception to that rule is expressly limited to Section 1983 actions brought by an adult convicted of a crime. 42 U.S.C. § 1997e(a)(1).

In that vein, whether *Younger* should be extended to state administrative proceedings must also necessarily hinge upon factors such as a party's ability to present his federal claims to that agency, the agency's authority to consider such claims and afford complete relief, the deference and respect that the state itself accords to its agency's factual findings and legal conclusions, the degree to which the particular agency is independent of the executive branch, and a host of other factors, such as those governing the appropriateness of requiring exhaustion of administrative remedies. *See generally McKart v. United States*, 395 U.S. 185, 193-195 (1969). HHA admits that "not *all* administrative proceedings are necessarily equivalent to judicial proceedings for *Younger* purposes" (HHA JS 26; emphasis in original). Because none of these matters was explored below, resolution of the larger issue of the extension of *Younger* to state administrative proceedings should await a case in which these matters have first been considered by the lower federal courts.

of this case. For the reasons given in our other Motions, therefore, Chapter 516 does not implicate state interests of the type *Younger* would protect.

C. Burford.

The Court of Appeals' conclusion that *Burford* is inapplicable not only is fully consistent with this Court's decisions, and not in conflict with the decision of any other Court of Appeals, but did not even evoke comment from the dissent. Contrary to appellants' contentions, this Court has ruled that *Burford* does not require abstention simply because eminent domain proceedings are involved. *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-189 (1959). This Court has never suggested that *Burford* requires abstention in a case like this in which (a) plaintiff has raised substantial federal constitutional claims, including claims under 42 U.S.C. § 1983, rather than simply relied upon diversity jurisdiction; (b) plaintiff's federal Constitutional claims are severable from any question of whether, under state law, the state is authorized to condemn Trustees' property, (c) resolution of that federal claim will not frustrate state policy beyond that demanded by the federal Constitution, and (d) the state has not established a specialized court to entertain all suits challenging the agency's actions. *Colorado River*, 424 U.S. at 814-815 & n.21; *Frank Mashuda, supra*; *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959); *Alabama Public Service Comm'n v. Southern Ry. Co.*, 341 U.S. 341 (1951); *Burford, supra*.

D. Colorado River.

Finally, Portlock alone argues, for the first time, that *Colorado River* abstention is justified for reasons of judicial administration and because a state court decision on the merits of Trustees' claims would be entitled to respect (Portlock JS 21). Portlock did not raise this claim below, however, and therefore may not raise it here. In any event, the Court of Appeals' conclusion that *Colorado*

River was inapposite—a conclusion to which the dissent below did not object—is plainly correct and does not conflict with any decision of this Court or any other Court of Appeals. To the contrary, the decision below is fully consistent with *Colorado River* and with two more recent decisions of this Court applying this doctrine: *Arizona v. San Carlos Apache Tribe*, 103 S. Ct. 3201 (1983), and *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 103 S. Ct. 927 (1983).²³ Further review of this newly-asserted claim is therefore unwarranted.

²³ Relying chiefly upon the McCarran Amendment (43 U.S.C. § 666 (1976)), a federal statute expressly approving of state court adjudication of comprehensive water rights disputes, *Colorado River* held that abstention in favor of state court adjudication of a massive (over 1,000 defendants) water rights dispute was appropriate on the facts of that case. *See also San Carlos, supra*. But, because "water rights adjudication is a virtually unique type of proceeding, and the McCarran Amendment is a virtually unique federal statute" (*San Carlos*, 103 S. Ct. at 3216), the abstention doctrine articulated in that case is limited to the peculiar circumstances respecting that type of problem. *See Moses H. Cone, supra*. Furthermore, none of the reasons given in *Colorado River* or *San Carlos* for abstention are applicable here.

First, this Court has on three occasions ruled that by far the most important factor in determining whether *Colorado River* abstention is appropriate was the presence of the McCarran Amendment, a federal statute approving of state court adjudication as a means of avoiding piecemeal litigation. *San Carlos*, 103 S. Ct. 3215; *Moses H. Cone*, 103 S. Ct. at 937; *Colorado River*, 424 U.S. at 820. There is no comparable federal statute here. Second, here, as in *Moses H. Cone*, and unlike in *Colorado River* and *San Carlos*, federal law will provide the basis for decision. Third, abstaining now on this basis would plainly be more, rather than less, efficient as a matter of judicial administration, because far more has taken place in federal court than the mere filing of a complaint, as was the case in *Colorado River*. 424 U.S. at 820 & n.25; *see San Carlos*, 103 S. Ct. at 3206 n.3; *Moses H. Cone*, 103 S. Ct. at 936. Fourth, the federal suit plainly preceded any state court suit. *See Moses H. Cone*, 103 S. Ct. at 939-941. Appellees also brought suit in federal court as promptly as possible (pages 4-5, *supra*). Fifth, the federal suit in no way approached the massive size of the *Colorado River* suit. *See* 424 U.S. at 820. Finally, Portlock has not suggested that the site of the federal courthouse was in any way inconvenient for

CONCLUSION

For the foregoing reasons and for the reasons given in our Motions to Affirm in Nos. 83-141 and 83-283, the judgment of the Court of Appeals should be affirmed. Should this Court instead note probable jurisdiction, the Court should do so only with respect to the Public Use Clause question presented by appellants, for the above reasons regarding abstention.²⁴

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the parties. *San Carlos*, 103 S. Ct. at 3206 & n.3; *Moses H. Cone*, 103 S. Ct. at 939; *Colorado River*, 424 U.S. at 820. None of the reasons for abstention suggested by *Portlock* (*Portlock JS 23-24*) are apposite.

²⁴ Trustees, of course, would raise the other bases for affirmance identified at pages ii-iii, *supra*, should this Court decide to give plenary consideration to the case.